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Public Prosecutor v Azfaiz bin Jamil

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-09–168–05 OF 2021
KAMALUDIN MD SAID, AHMAD NASFY AND HASHIM HAMZAH JJCA
25 JULY 2022

C

Criminal Procedure — Conviction — Previous convictions ('PCs') — Mode for proving PCs — Section 400 Criminal Procedure Code ('CPC') — Whether High Court wrong to affirm sessions court's decision that only Registrar of Criminals under Registration of Criminals and Undesirable Persons Act 1969 ('RCUPA') had
D *authority to prove accused person's PCs under s 400 CPC — Whether s 400 clearly provided that method it prescribed was another mode in law of proving PCs and acquittals — Whether under s 400 CPC, 'officer having custody of the records of the court' was authorised to prove an accused's PCs or acquittals — Whether Registrar of Subordinate Courts was such an 'officer' — Whether courts below*
E *erred in rejecting the Subordinate Court Registrar's evidence to prove accused person's PCs*

The respondent was charged in the sessions court for consuming or administering to himself amphetamine and methamphetamine — an offence
F under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') which carried the penalty of a fine not exceeding RM5,000 or a jail term not exceeding two years. But in the respondent's case, the charge stated that his offence was punishable under s 39C(1)(b) of the DDA which carried the heavier penalty of a jail term of between five and seven years plus whipping of not more than three
G strokes. The increased penalty section was invoked in the respondent's case because he had two previous convictions ('PCs') for a s 15(1)(a) of the DDA offence. To prove those two PCs, the prosecution called the registrar of the subordinate courts in Johor Bahru (where the trial took place) to tender the sealed court orders of two magistrate's courts which had convicted the
H respondent for the previous s 15(1)(a) offences. The registrar ('SP2') gave her evidence pursuant to s 400 of the Criminal Procedure Code ('the CPC') which prescribed the procedure for proving PCs or acquittals. After finding the respondent guilty of committing the s 15(1)(a) offence, the sessions court judge ('SCJ') fined him RM5,000 in default six months' jail and ordered him
I to undergo three years' of supervision under s 38B of the DDA. The SCJ rejected SP2's evidence as well as the evidence of the two previous magistrate courts' conviction orders on the respondent on the ground that SP2 was not the appropriate officer who had the authority under s 400 of the CPC to prove the respondent's PCs as only the Registrar of Criminals under the Registration of

Criminals and Undesirable Persons Act 1969 ('the RCUPA') was authorised to do so. The High Court judge ('JC') affirmed the SCJ's decision on appeal, holding that resort should be had to the RCUPA, and not to the provisions of the CPC, to prove the past records of criminals since it was the specific legislation that dealt with the registration of criminals. The instant appeal was against the JC's decision.

Held, unanimously allowing the appeal, setting aside the SCJ's sentence and substituting it with a sentence of five years' jail and one stroke of whipping:

(1) The sentence imposed by the SCJ was plainly wrong as the offence against the respondent was punishable under s 39C(1)(b) of the DDA. The SCJ had sentenced the respondent under s 15(1)(a) of the DDA without considering that he had two previous convictions ('PCs') for committing the same offence (see paras 51 & 53).

(2) SP2 was the registrar or officer who kept the records of the court and was the one who had signed and issued the sealed orders of the magistrate's court relating to the respondent's two PCs. Under s 400(1)(a) of the CPC, a previous conviction or acquittal may be proved by an extract of the relevant order certified by 'the officer having the custody of the records of the Court'. So long as the officer or keeper of the records of the court — which was SP2 in this case — could prove the respondent's PCs by extract of the certified records kept by her and the court was satisfied that the records were the court's records, such evidence was sufficient. The SCJ should have admitted SP2's evidence to prove the respondent's PCs under s 400 of the CPC as she was qualified to give evidence for that purpose (see paras 28–31 & 42).

(3) The phrase 'officer having the custody of the records of the Court' in s 400(1)(a) of the CPC was plain and clear and had to be given its literal interpretation. Those words could not be read as referring to the Registrar of Criminals under the RCUPA. If that had been Parliament's intention, the word 'officer' would have been defined to refer to the Registrar of Criminals (see para 32).

(4) The JC was plainly wrong in finding that there was a conflict between s 400 of the CPC and the RCUPA and that the provisions of the latter overrode the former. Since s 400 of the CPC itself provided that the method it prescribed was 'in addition to any other mode provided by any law for the time being in force' for proving PCs or acquittals, there was no conflict between s 400 and the RCUPA and no question of the latter overriding the former on the principle of *generalia specialibus non derogant* (see paras 34–35 & 40).

[Bahasa Malaysia summary

Responden dituduh di mahkamah sesyen kerana memasukkan amphetamine dan methamphetamine ke dalam badannya — satu kesalahan di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang membawa hukuman denda tidak melebihi RM5,000 atau penjara tidak melebihi dua tahun. Namun dalam kes responden, pertuduhan menyatakan kesalahannya boleh dihukum di bawah s 39C(1)(b) ADB yang membawa hukuman lebih berat iaitu penjara antara lima dan tujuh tahun serta sebat tidak lebih daripada tiga sebatan. Seksyen hukuman yang lebih berat tersebut diguna pakai di dalam kes responden kerana dia mempunyai dua sabitan lampau ('SL') bagi kesalahan s 15(1)(a) ADB. Untuk membuktikan kedua-dua SL tersebut, pendakwaan memanggil pendaftar mahkamah rendah di Johor Bahru (di mana perbicaraan berlangsung) untuk mengemukakan perintah mahkamah yang dimeterai oleh dua mahkamah majistret yang telah mensabitkan responden bagi kesalahan terdahulu di bawah 15(1)(a) ADB. Pendaftar mahkamah ('SP2') memberikan keterangannya menurut s 400 Kanun Tatacara Jenayah (KTJ') yang menetapkan prosedur untuk membuktikan SL atau kes yang dibebaskan. Selepas mendapati responden bersalah melakukan kesalahan tersebut s 15(1)(a), hakim mahkamah sesyen ('HMS') memberikan denda RM5,000 jika gagal bayar penjara enam bulan dan memerintahkannya menjalani pengawasan selama tiga tahun di bawah s 38B ADB. HMS menolak keterangan SP2 serta keterangan kedua-dua perintah sabitan mahkamah majistret terdahulu terhadap responden atas alasan SP2 bukan pegawai yang sesuai yang mempunyai kuasa di bawah s 400 KTJ untuk membuktikan SL responden kerana hanya Pendaftar Jenayah di bawah Akta Pendaftaran Jenayah dan Orang Yang Tidak Diingini 1969 ('Akta') diberi kuasa untuk berbuat demikian. Hakim Mahkamah Tinggi ('HMT') mengesahkan keputusan HMS di peringkat rayuan, memutuskan bahawa peruntukan Akta digunapakai, bukannya KTJ untuk membuktikan rekod lampau kerana ianya adalah undang-undang khusus yang mengurus pendaftaran penjenayah. Rayuan ini adalah untuk keputusan HMT.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan hukuman HMS dan menggantikannya dengan hukuman lima tahun penjara dan satu sebatan:

(1) Hukuman yang dijatuhkan oleh HMS adalah jelas salah kerana kesalahan terhadap responden dihukum di bawah s 39C(1)(b) ADB. HMS telah menjatuhkan hukuman ke atas responden di bawah s 15(1)(a) ADB tanpa mengambil kira bahawa dia mempunyai dua sabitan lampau ('SL') kerana melakukan kesalahan yang sama (lihat perenggan 51 & 53).

(2) SP2 adalah pendaftar atau pegawai yang menyimpan rekod mahkamah dan merupakan orang yang telah menandatangani dan mengeluarkan

perintah termeterai mahkamah majistret yang berkaitan dengan dua SL responden. Di bawah s 400(1)(a) KTJ, sabitan atau kes pembebasan terdahulu boleh dibuktikan dengan pengestrakkan perintah yang berkaitan yang diperakui oleh 'pegawai yang menyimpan rekod Mahkamah'. Selagi pegawai atau penjaga rekod mahkamah — yang merupakan SP2 dalam kes ini — boleh membuktikan SL responden dengan mengekstrak rekod yang diperakui dan mahkamah berpuas hati bahawa rekod tersebut adalah rekod mahkamah, keterangan tersebut adalah mencukupi. HMS sepatutnya menerima keterangan SP2 untuk membuktikan SL responden di bawah 400 KTJ kerana beliau layak untuk memberikan keterangan bagi tujuan itu (lihat perenggan 28–31 & 42).

(3) Frasa 'pegawai yang menyimpan rekod Mahkamah' di dalam s 400(1)(a) KTJ adalah jelas dan perlu diberi tafsiran harfiah ('literal'). Frasa tersebut tidak boleh dibaca sebagai merujuk kepada pendaftar jenayah di bawah Akta. Jika itu adalah niat Parlimen, perkataan 'pegawai' akan ditakrifkan untuk merujuk kepada pendaftar jenayah (lihat perenggan 32).

(4) HMT jelas terkhilaf ketika memutuskan bahawa terdapat konflik antara s 400 KTJ dan Akta dan memutuskan bahawa Akta mengatasi s 400 KTJ. Oleh kerana s 400 KTJ menyatakan bahawa 'sebagai tambahan kepada lain-lain cara yang diperuntukkan oleh sebarang undang-undang yang berkuat kuasa' untuk membuktikan SL atau kes pembebasan, tiada konflik antara s 400 dan Akta dan peruntukan-peruntukan berkenaan tidak mengatasi antara satu sama lain menurut prinsip *generalia specialibus non derogant* (lihat perenggan 34–35 & 40).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (distd)

Antonia Marleen Yarendra v Chai Wei Chung [2017] 4 MLJ 359, CA (folld)

Dato' Sukri bin Hj Mohamed v Wan Muhammad Azri bin Wan Deris [2016] 3 MLJ 529; [2016] 4 CLJ 654, CA (refd)

PP v Hew Yew [1972] 1 MLJ 164 (refd)

PP v Man bin Ismail [1939] 1 MLJ 207, CA (refd)

Suresh Kumar a/l Velayuthan v PP [2020] 10 MLJ 549; [2020] 4 CLJ 270, HC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721; [2020] 7 CLJ 561, FC (refd)

Legislation referred to

Criminal Procedure Code ss 180, 180(4), 399, 399(3), 400, 400(1), (1)(a), Chapter XXXIX
Dangerous Drugs Act 1952 ss 10(2)(b), 15(1), (1)(a), 37(a), (b), (c), (d), (da), (e), (f), (g), (h), (i), (j), 38B, 39C, 39C(1), (1)(b)
Evidence Act 1950 ss 57, 57(1)(g), (1)(m), 59, 60, 80
Interpretation Acts 1948 and 1967 s 17A
Registration of Criminals and Undesirable Persons Act 1969 ss 2, 2(a), 3, 7, 10, First Schedule
Subordinate Courts Act 1948 ss 3, 4, 5, 5(1), (2), Part II

Appeal from: *Pendakwa Raya lwn Azfaiz bin Jamil* [2021] MLJU 932 (High Court, Johor Bahru)

Fauziah bt Daud (Deputy Public Prosecutor, Attorney General Chambers) for the appellant.
Shaik Saleem bin SM Daud (Shaik Adam & Co) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] This is the appellant's appeal against the decision of the learned judicial commissioner ('the learned JC') in dismissing the appellant's appeal against the session court judge's ('the SCJ') decision for failing to sentence the respondent under s 39C of the Dangerous Drugs Act 1952 ('the DDA'). The SCJ sentenced the respondent with a fine of RM5,000 in default six months imprisonment under s 15(1)(a) and three years supervision under s 38B of the DDA.

[2] Section 39C of the DDA carries punishment of imprisonment for a term which shall not be less than five years but shall not exceed seven years, and shall also be punished with whipping of not more than three strokes.

[3] The charge against the respondent at the session court reads as follows:

> Bahawa kamu pada 31.07.2019 jam lebih kurang 0530 petang, di Pejabat Bahagian Siasatan Jenayah Narkotik IPD Kulai Johor, di dalam daerah Kulai, dalam Negeri Johor Darul Takzim, telah memasukkan dadah berbahaya jenis Amphetamine dan Methamphetamine kepada diri sendiri ke dalam badan kamu, oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah seksyen 15(1)(a) ADB 1952 dan boleh dihukum di bawah di bawah seksyen 39C(1)(b) Akta Dadah Berbahaya 1952.

THE UNDISPUTED FACTS

[4] The finding of facts by the SCJ leading to the conviction of the respondent is not disputed. The respondent is found guilty for an offence under s 15(1)(a) of the DDA.

[5] At the session court, the Registrar of the Surbodinate Court of Johore Bahru ('SP2') tendered two sealed orders of the court which clearly show the respondent's had been convicted on the same offence under s 15(1)(a) of the DDA by two different Magistrates' Court of Johore Bahru. SP2 gave evidence under s 400 of the Criminal Procedure Code ('the CPC') for such purpose. The orders of the court were then marked as exhs P7(a) and (b).

[6] It is the appellant's case that respondent who was convicted under s 15(1)(a) of the DDA shall be sentenced under s 39C(1) of the DDA based on his past convictions on the same offence as shown in the exhs P7(a) and (b) tendered through SP2 as mode of proving the same under s 400 of the CPC.

[7] The SCJ rejected SP2's evidence and the exhibits on reason that SP2 lacks authority and not competent to give evidence under s 400 of the CPC. The SCJ held that SP2 is not the appropriate officer under s 400 of the CPC. The approppriate officer in her view is the Registrar of Criminal under Registration of Criminals and Undesirable Persons Act 1969 ('the RCUPA').

[8] On appeal, the learned JC agreed with the SCJ and affirmed the SCJ's decision. It was decided, inter alia that past records of criminals must be proved under RCUPA since RCUPA is specific legislation dealing with registrations of criminals.

[9] The learned JC was of the view that CPC is a general legislation. Since the words, 'Registrar' under s 2 of the RCUPA is defined as the Registrar of Criminals under s 3 and the registers are maintained by Registrar of Criminal under s 7 therefore, RCUPA overides the CPC. She held that SP2 is not a qualified person and had no authority to prove past convictions records of the respondent under s 400 of the CPC.

THE MAIN ISSUE

[10] The appellant raised several issues pertaining to the decision of the learned JC. However, in our view, the main issue is whether the respondent's past convictions records under s 15(1)(a) of the DDA may be proved through SP2 under s 400 of the CPC for purpose of punishment under s 39C of the DDA. In other words, whether SP2 is a qualified or relevant officer to prove past convictions records of the respondent by way of s 400 of the CPC.

A THE APPELLANT'S SUBMISSION

[11] The appellant submitted that the evidence by SP2 and the past convictions records of the respondent ie exhs P7(a) and (b) tendered during the trial must be accepted as admissible evidence under s 400 of the CPC. The words 'may be proved in addition to any other mode provided by any law for the time being in force' s 400 of the Criminal Procedure Code means the law allows such evidence to be given in order to prove the past convictions records of the respondent.

[12] Further, the words 'the officer having the custody of the records of the Court' in s 400 of the the CPC in the presence context must necessarily refer to SP2, the officer who keeps the records of the court. It is very clear that the words does not refer to or alternatively not restricted to the Registrar of Criminals under s 7 of the RCUPA. Such words have not been defined in the CPC. It is clearly not the intention of Legislature for purpose of s 400 of the CPC to require the Registrar of Criminals to prove the past convictions of the respondent. In defining the words, the court needs to also refer to other sections in the CPC for example, in the context of report under s 399 of the CPC , it uses the words 'Registrar of Criminals'. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself (*Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561).

[13] The appellant also submitted that the words 'which that conviction or acquittal was had to be a copy of the sentence or order' in s 400 of the CPC must necessarily mean document to prove the conviction or acquittal. It raises a question whether the 'Registrar of Criminals' is able to confirm a conviction or acquittal when he is not the 'officer having the custody of the records of the Court' ie the copy of the sentence or order.

[14] Section 2(a) of the RCUPA defines registrable particulars means 'the particulars of any conviction or sentence in respect of a registrable offence' therefore,it is clear the particulars do not include 'an acquittal'. It fortifies the view that the words 'officer having the custody of the records of the Court' in s 400 of the CPC does not refer to 'Registrar of Criminals'. It follows that RCUPA being a specific legislation does not override CPC. In other words, the maxim of *generalia specialibus derogant* does not apply.

[15] In the instance case, the oral evidence by SP2 who is the Registrar of the Surbodinate Court must be accepted as mode of proving the past convictions

of the respondent under s 400 of the CPC. SP2 is a qualified person under the CPC to give evidence for this purpose. This is consistent with s 59 of the Evidence Act 1950 ('the EA') that provide all facts, except the contents of documents, may be proved by oral evidence (*Dato' Sukri bin Hj Mohamed v Wan Muhammad Azri bin Wan Deris* [2016] 3 MLJ 529; [2016] 4 CLJ 654 (CA)). SP2 had tendered exh P6 ie a letter dated 4 September 2019 which enclosed two past or previous convictions of the respondent under s 15(1)(a) of the DDA which were marked as exhs P7(a) and P7(b). These exhibits are the sealed orders of the court. The court must take judicial notice of the seals of courts and the officers acting in execution of its process as provided under s 57 of the EA.

[16] In conclusion, the appellant submitted that if this court agrees with the appellant, the appeal must be allowed and the court may set aside the sentence imposed by the lower courts and sentence the respondent under s 39C of the DDA which provides mandatory punishment of imprisonment for a term which shall not be less than five years but shall not exceed seven years, and he shall also be punished with whipping of not more than three strokes.

[17] It is settled law that where a provision of the law states that upon conviction a person 'shall be punished' with the prescribed offence, then the court has no discretion to consider any other punishment. This court is bound by the decision of the Court of Appeal in *Antonia Marleen Yarendra v Chai Wei Chung* [2017] 4 MLJ 359 wherein the distinction between the meaning of the phrases 'shall be liable for' and 'shall be punished with' were discussed. The Court of Appeal referred with approval to the cases of *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207 and *Public Prosecutor v Hew Yew* [1972] 1 MLJ 164 and concluded that it is the position under criminal law that only where the punishment provides that the offender 'shall be liable' for a punishment would the court be accorded with a discretion. Otherwise, where the punishment is stated as 'shall be punished' with the prescribed punishment then that punishment is mandatory.

THE RESPONDENT'S SUBMISSION

[18] The respondent submitted that the appellant merely called SP2 which was a registrar of the lower court in Johor Bahru and tendered exhs P6, P7(a) and P7(b) as evidence to prove the past convictions records of the respondent. The learned JC had considered all the issues raised by the appellant and infact possed the relevant question on the proper mode applicable to prove previous convictions of the respondent. Having referred to s 400 of the CPC and RCUPA, the learned JC is of the view that SP2 is not an officer as defined by both statutes to prove the respondent's previous convictions records (at paras 31–46 of of the grounds).

[19] It was also submitted that s 7 of the RCUPA merely states the official functions of the 'officer' whereas s 400 of the CPC states on how a previous conviction records is to be proved. However in s 400 of the CPC, the same word 'officer' is used. The learned JC was only trying to ascertain who is the 'officer' as mentioned in s 400 of the CPC and s 7 of the RCUPA. The learned JC went on to make a finding that CPC does not have a definition for the phrase 'officer having custody of the records of the court'. The learned JC also finds that the CPC is a piece of Legislature that is general in nature.

[20] The determinig issue is the words 'officer' and the correct law applicable. The learned JC referred to the First Schedule of RCUPA which says that all offences under s 15(1)(a) of the DDA (of which the respondent was charged) is listed under RCUPA (at para 38 of the grounds). Having considered the definition, the correct law applicable and mode to be applied in proving previous convictions records in court, the learned JC is of the view that s 7 of the RCUPA is the specific law and CPC is the general law. Therefore, s 7 of the RCUPA overides the provision in the CPC (at paras 39–40 of the grounds). The learned JC was correct in ascertaining the correct legal principles to be obtained and applied.

[21] The learned JC also posed a question in the grounds of judgment whether SP2 is the Registrar of Criminal who keeps the particulars of conviction and acquittal of registrable offences under the First Schedule of the RCUPA (at para 45 of the grounds). As SP2 is not a recognised officer as mention in RCUPA the learned JC was of the opinion that SP2 is not a qualified person to prove the respondents previous convictions records. Therein lies the reasoned decision of the learned JC as to why the prosecution failed to prove the legal requirements pursuant to s 400 of the CPC and why s 39C(1) of the DDA was inapplicable.

[22] The respondent submitted that the learned JC's reasoned judgment as to why SP2 is not recognised in law to prove the respondent's previous convictions, is also fortified by s 399 of the CPC which relate to report of certain person. Section 399(3) of the CPC clearly provides for particular reference to the 'Registrar of Criminal', which is also a term defined in the RCUPA. Hence, the CPC has made specific reference to the RCUPA. It is also observed that both ss 399 and 400 of the CPC are in Chapter XXXIX (Special Provisions Relating to Evidence). Further, the definition of a 'Registrar' in the CPC only refers to the Chief Registrar, Deputy Registrar or any Assistant Registrar of the Federal Court, of the Court of Appeal or of the High Court. There is no mention of a Registrar with respect to a subordinate court.

[23] The respondent submitted that what the learned JC was saying in her ground of judgments is that RCUPA is actually to be read together with the

CPC, where the specific provisions are to be utilised in order to ascertain how to prove a previous conviction records for example the use of s 10 of the RCUPA in how to prove previous convictions which involves fingerprint evidence ascertained and what is needed to satisfy the court as sufficient proof to enable the piece evidence to be admissible. This is highly relevant, as s 400(1) of the CPC contains the words such as '… together with, in each of those cases, evidence as to the identity of an accused person with the person so convicted or person with the person so convicted acquitted'. Section 10 of the RCUPA is the mode of proof to prove a previous convictions record. Hence, a harmonious reading of s 400 of the CPC, together with RCUPA affords a proper method of proving the respondents previous convictions records which the prosecution failed to do.

[24] In conclusion, the respondent submitted that the prosecution had the burden of proof, to prove the respondent's previous convictions pursuant to s 39C(1)(b) of the DDA, where in that there were previous convictions under ss 10(2)(b) or 15(1)(a) of the DDA. The learned JC had found that the prosecution failed to adhere to the abovementioned statutory requirements. Since SP2 is found not the appropriate person to testify as to the respondent's previous convictions, exhs P6, P7(a) and P7(b) tendered by SP2 do not serve any purpose.

OUR DECISION

[25] The respondent was charged under s 15(1)(a) of the DDA and if found guilty can be punished under s 39C(1)(b) of the same Act. Section 15(1) of the DDA provides as follows:

> Section 15 Self Administration
>
> (1) Any person who —
>
> (a) Consumes, administers to himself ir suffers any person, contrary to section 14 to administer to him any dangerous drug specified in Parts 111 and 1V of the First Schedule; or
>
> (b) Is found in any premises kept or used for any purposes specified in section 13 in order that such dangerous drug may be administered to or smoked or otherwise consumes by him;
>
> shall be guilty of an offence against this Act and shall be on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years.
>
> (2) For purpose of this section, 'consumes' includes eat, chew, smoke, swallow, drink, inhale or introduce into the body in any manner or by any means whatsoever.

[26] Section 39C(1)(b) provides as follows:

39C Increased penalty where person has prior admissions or convictions

(1) Where a person who has not less than —

(a) two previous admissions;

(b) *two previous convictions under paragraph 10(2)(b) or paragraph 15(1)(a) or any combination of the sections;*

(c) one previous admission and one previous conviction under paragraph 10(2)(b) or paragraph 15(1)(a);

(d) one previous admission and two previous convictions under section 31A or

(e) one previous conviction under paragraph 10(2)(b) or paragraph 15(1)(a) and two previous convictions under section 31A,

is found guilty of an offence under paragraph 10(2)(b), paragraph 15(1)(a) or section 31A, he shall, instead of being liable to the punishment provided for that offence under the section under which he has been found guilty*, be punished with imprisonment for a term which shall not be less than five years but shall not exceed seven years, and he shall also be punished with whipping of not more than three strokes.* (Emphasis added.)

[27] The fact shows that the prosecution's witness SP2 gave evidence in the session court to prove that the respondent had two past convictions records under s 15(1)(a) of the DDA for purpose of sentence under s 39C of the DDA. She produced the letter marked as exh P6 showing the status of two convictions as follows:

BIL.	NAMA	NO KES & PERTUDUHAN	STATUS KES
1.	Azfaiz bin Jamil (Kp: 950526–08–6451)	JA-83D-123–01 Tahun 2018 (MMJ3) Sek 15(1)(a) ADBJH 08/01/2018	Denda RM1000 jika gagal bayar lima bulan penjara, PS dua tahun
2.	Azfaiz bin Jamil (Kp: 950526–08–6451)	JA-83D-125–01/2018 (MMJ2) Sek 15(1)(a) ADBJH 08/01/2018	Denda RM1000 jika gagal bayar lima bulan penjara, PS dua tahun

[28] Exhbit P6 enclosed together with the orders of the court (exhs P7(a) and P7(b) which show that the respondent had been previously convicted under s 15(1)(a) of the DDA. SP2 is the registrar or the officer who issued and signed the orders and keeps the record of the court. SP2 had also confirmed and identified the said orders dated 8 January 2018 respectively. The genuinity of the orders are not disputed. Based on the two orders of court, we are of the view that there should not be any doubt that the respondent had been convicted and sentence twice for the same offence in 2018 by two different Magistrates' Court of Johor Bahru. By the said previous convictions records, the sentence against

the respondent should have been dealt with under s 39C(1)(b) of the DDA that he be punished with imprisonment for a term which shall not be less than five years but shall not exceed seven years, and he shall also be punished with whipping of not more than three strokes.

[29] Section 400 of the CPC provides as follows:

> 400 How previous conviction or acquittal may be proved
>
> (1) In any inquiry, trial or other proceeding under this Code a previous conviction or acquittal or an order directing any person to be under the supervision of the police *may be proved in addition to any other mode provided by any law for the time being in force* —
>
> (a) by an extract certified under the hand of *the officer having the custody of the records of the Court* whether of Malaysia or the Republic of Singapore in which that conviction or acquittal was had to be a copy of the sentence or order; or
>
> (b) in case of a conviction either by a certificate signed by the officer in charge of the prison in Malaysia or the Republic of Singapore in which the punishment or any part of it was inflicted, or by production of the warrant of commitment under which the punishment was suffered,
>
> together with, in each of those cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

[30] It is not diputed that s 400 of the CPC provides for mode of proving past convictions records and prove by an extract certified under the hand of the officer having the custody of the records of the court. It is also our view that past convictions records may also be proved by extract of particuars of the register under RCUPA. Although the register is kept by the Registar of Criminal under RCUPA, it does not mean that prove of past convictions cannot be proved by the officer having the custody of the records of the court under s 400 of the CPC.

[31] Section 400 of the CPC recognises mode of prove past convictions by an extract certified under the hand of the officer having the custody of the records of the court. As long as the officer or keeper of the records of the court can prove past convictions records of the respondent by extract certified records kept by her and the court is satisfied that the records are the court's records, such evidence is sufficient. The words in s 400 of the CPC 'which that conviction or acquittal was had to be a copy of the sentence or order' must necessarily mean orders from the competent court or warrant of committment or acquittal. Since s 400 of the CPC is a mode of proving past convictions records, it does not exclude the officer having the custody of the records of the court to produce a copy of the sentence or order. In the presence context it must

necessarily refers to SP2, the registrar who has the custody of the copy of sentence or order.

[32] In our view the words 'officer' under s 400 of the CPC must be read in its original context of 'officer having the custody of the records of the Court'. Such words cannot be taken out and read separately or substituted with the words 'Registrar of Criminals'. If the intention of Parliament is to require the Registar of Criminals as the appropriate officer, the words 'officer' would have been define to refer to the Registar of Criminals. The words 'officer having the custody of the records of the Court' must be given a literal interpretation. It is very plain and clear devoid of any uncertainty or suffer from any vagueness.

[33] In *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561, Justice Vernon Ong Lam Kiat FCJ held that:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself.* Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. *Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning.* The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision;* where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself. (Emphasis added.)

[34] The learned JC was of the view that there is a conflict between s 400 of the CPC and RCUPA. Since RCUPA is the specific Act, the *maxim generalia specialibus derogant* applies. The finding is based on the principles found *in Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151. The second case referred to is *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270, which held that there are certain specific pieces of legislation designed to prevail over the more general provisions of law and these must be given full effect and the maxim must not be ignored as mere surplusage.

[35] The learned JC was of the view that the provisions of RCUPA overides the provisions in the CPC. In determining who is the rightful officer to prove the past convictions records, s 7 of the RCUPA is applicable ie the Registrar of Criminal and not SP2. We find the learned JC had misapplied the law in the context of this instance case. Her decision is plainly wrong.

[36] The respondent's counsel in his submission submitted that there is no conflict between CPC and RCUPA. However, his submission is that a harmonious reading of s 400 of the CPC, together with RCUPA affords a proper method of proving the respondents previous convictions records. The learned JC by applying the maxim of 'generalia specialibus non derogant' had taken the stand that there is a conflict between CPC and RCUPA and the later being the specific law should prevail.

[37] We find the learned JC failed to appreciate the decision of the Federal Court in *Abdullah bin Atan v Public Prosecutor*. It s important to read and understand the full argument and the decision in that case. The issue in *Abdullah bin Atan v Public Prosecutor* is different. It was argued by the appellant's counsel that the presumption in s 37(da) cannot be invoked to establish a prima facie case under s 180 of the CPC, because that presumption is not evidence. Hence, it was argued that in relying on such presumption, it cannot be said that the prosecution has 'adduced credible evidence proving each ingredient of the offence' under s 180(4) of the CPC. The argument is premised purely on semantics. The Federal Court answered by saying that the presumptions in s 37(a) to (j) of the DDA have been in place since the promulgation of the Dangerous Drugs Ordinance 1952. The presumption of trafficking in s 37(da) of the DDA was inserted in 1997. These statutory presumptions long pre-date the insertion of s 180(4) of the CPC in 2006. Therefore, when s 180(4) of the CPC was introduced, Parliament is presumed to be aware of the existing law and of the specific manner and method in which trafficking cases are proved ie, on a presumption basis upon a finding of fact of possession. Had Parliament intended the drastic consequence of effectively repealing a long-established statutory provision, one would expect Parliament to have said so in clear terms (see *Takako Sakao (f) v Ng Pek Yuen (f) & Anor*

A [2009] 6 MLJ 751 at para [33]; [2010] 1 CLJ 381 at para [34]).

[38] In the instance case, s 400 of CPC was introduced in 1976 by Act A324 which was subsequently repealed by Act A593 and come into force on 4 April 1999. The Registration of Criminals and Undesirable Persons Act 1969 had been there much longger period, Parliament is presumed to be aware of the existing law and of the specific manner and method in which previous convictions or acquittals may be proved. It is the reason why the words 'in addition to any other mode provided by any law for the time being in force' in s 400 of the CPC is expressly stated to recognise that RCUPA is the existing law in force for that purpose. Parliament has said this in clear terms.

[39] When the Legislature has given its attention to a separate subject, and made provisions for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms (see: *Bindra's Interpretation of Statutes* (10th Ed) at p 649).

[40] We would agree without the words 'in addition to any other mode' s 400 of the CPC would be in conflict with RCUPA which is the specific law. Therefore, it is our considered view that s 400 of the CPC may be used as another mode to prove convictions or acquittals. There is no conflict between CPC and RCUPA therefore, the issue of RCUPA being specific law and the maxim of 'generalia specialibus non derogant' applies does not arise.

[41] The law relating to the admissibility of evidence is governed by the Evidence Act 1950 ('the EA'). In the presence case, the appellant called witness in SP2 to prove the respondent's past convictions records for the purpose of sentencing under s 39C of the DDA. SP2 has produced two sealed orders of the court as prove of the respondent's past convictions records on the same offence.

[42] The oral evidence by SP2 who is the Registrar of the Surbodinate Court should have been admitted or admissible as mode of proving the past convictions records of the respondent under s 400 of the CPC. SP2 is a qualified person under the CPC to give evidence for this purpose. This is consistent with s 59 of the EA that provide all facts, except the contents of documents, may be proved by oral evidence. Section 60 of the EA also provides that oral evidence shall in all cases whatsoever be direct (*Dato' Sukri bin Hj Mohamed v Wan Muhammad Azri bin Wan Deris* [2016] 3 MLJ 529; [2016] 4 CLJ 654). SP2 has tendered exh P6 ie a letter dated 4 September 2019 which enclosed two past or previous convictions records of the respondent under s 15(1)(a) of the DDA which were marked as exhs P7a and P7b. These exhibits are the sealed orders of the court. The court can also take judicial notice of all

the seals of Courts of Malaysia which any person is authorised to use and SP2 is the officer acting in execution of its process as provided under s 57 of the EA (see: s 57(1)(g) and (m)).

[43] The next question is whether exhs 7(a) and 7(b) fulfill the requirement as an an extract certified under the hand of the officer having the custody of the records of the court under s 400(1)(a) of the CPC or is it the court's proper records. It is very clear that record of any previous conviction(s) may be proved by way of an extract by an officer in charge of the court records, be it in Malaysia or Singapore, or a certificate signed by an officer in charge of a prison in either country or by the production of the warrant of commitment under which the punishment was imputed.

[44] It is not disputed that SP2 in her evidence in court stated that she is the Registrar of the Subordinate Court of Johor Bahru. Her duty is to administer the registration of new cases and completed cases and to ensure all records and files are being kept in proper and systematic manner. Part II of the Subordinate Courts Act 1948 (Act 92) provides the Subordinate Courts for the administration of civil and criminal law in Peninsular Malaysia are the session courts and the magistrates' courts (s 3). Each court shall have and use as occasion may require a seal of such nature and pattern as the Chief Judge may, by notification in the *gazette*, prescribed (s 4). All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal shall be issued or made by a sessions court, be signed by the sessions court judge, or be signed, on behalf of the sessions court judge, by a magistrate of either class within the local limits of whose jurisdiction the sessions court situate *or by the Registrar of the Subordinate Courts.* If issued or made by a magistrates' court, be signed by a magistrate of either class within the local limits of whose jurisdiction the court is situate, *or be signed by a Registrar of the Subordinate Courts* situate in the same town or place as the magistrates' court, and every such summons, warrant, order, rule, notice and mandatory process shall be sealed with the seal of the court issuing or making the same. Finally, all summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of any court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Peninsular Malaysia (s 5(1) and (2)).

[45] It is not disputed that both P7(a) and P7(b) are Orders of the Subordinate Court of Johor Bahru. Both documents show that the respondent's previous cases was registered at the magistrate's court (2) and (3) of Johor Bahru. The orders say that he was sentenced by the magistrates' court on 8 January 2018 respectively. *The orders were prepared, signed and issued by SP2 as the Registrar of the Subordinate Court of Johor Bahru* in accordance with

the process in s 5 of the Subordinate Court Act 1948. The seal of Subordinate Court of Johor Bahru is placed on both of the orders. The genuiness of two orders of the magistrates' court are not disputed. Hence, they can be admitted as record of evidence (see: s 80 of the EA).

[46] Coming back to s 400 CPC where it says, previous conviction or acquittal or an order directing any person to be under the supervision of the police may be proved by an extract certified. Reading para (a) of s 400(1) carefully, the extract certified documents is referred to a copy of sentence or order. In *Oxford Dictionary of Law Enforcement* by Graham Gooch and Michael William (1Ed) the words, 'certified extract' is defined as extract from the register of a magistrates court authenticated by the court or clerk of the justices.

[47] We have alluded to earlier that SP2 is the custodian of the record of the court. The documents produced are the orders on past convictions record that was kept in Case Management System of the Court ('CMS'). SP2 had produced the documents upon the request from Investigating Officer Sarjan Rohashima bt Hamzah via the system dated 29 August 2019. The letter is dated 4 September 2019. The system online is based on the IC of the person. From there it can see the past convictions of the person in the Johor Bahru Magistrate's Courts. The two orders dated 8 January 2018 were issued and signed by SP2, with sealed of the Magistrates Court Johore Bahru placed on both the orders.

[48] Based on the said orders which are produced and marked as exhs 7(a) and 7(b), we are satisfied that the documents are the extracts from the CMS certified by SP2 who is the Registar of the Surbodinate Court at Johor Bahru. We are satisfied that the exhibits are the copy of the sentence or order s 400 of the Criminal Procedure Code to prove past convictions records of the respondent and and SP2 is a qualified person to prove those documents.

[49] In any event, the court has the duty to verify any documents produced purportedly to prove past conviction records s 400 of the Criminal Procedure Code are extract certified documents by the officer who keeps the records of the court or by the registrar of the subordinate courts within the local limits of jurisdiction.

CONCLUSION

[50] Having considered the contents of exhs P7(a) and (b), we are satisfied that exhs P7(a) and (b) are the orders of the court which showed the past convictions and sentences against the respondent under s 15(1) of the DDA issued by SP2 and SP2 is the appropriate officer to prove past convictions records of the respondent.

SENTENCE

[51] In this instance case the SCJ failed to take into account the past conviction records of the respondent for purpose of sentencing under s 39C of the DDA but sentenced the respondent with a fine of RM5,000 in default six months imprisonment under s 15(1)(a) and three years supervision under s 38B of the DDA. The sentence under s 39C of the DDA carries punishment of imprisonment for a term which shall not be less than five years but shall not exceed seven years, and shall also be punished with whipping of not more than three strokes.

[52] We agree with the appellant that the word used in s 39C of the DDA is 'shall be punished with' which connotes mandatory punishment. This Court of Appeal in *Antonia Marleen Yarendra v Chai Wei Chung* [2017] 4 MLJ 359 made the distinction between the meaning of the phrases 'shall be liable for' and 'shall be punished with'. The position under criminal law that only where the punishment provides that the offender 'shall be liable' for a punishment would the court be accorded with a discretion. Otherwise, where the punishment is stated as 'shall be punished' with the prescribed punishment then that punishment is mandatory (see *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207 and *Public Prosecutor v Hew Yew* [1972] 1 MLJ 164).

[53] Based on our judgment, the sentence imposed by the SCJ is plainly wrong. The charge against the respondent is for an offence under s 15(1)(a) which can be punished under s 39C of the DDA. We therefore, set aside the sentence imposed by the SCJ and substitute with imprisonment of five years and whipping of one stroke against the respondent.

[54] The appeal is allowed.

Appeal allowed, SCJ's sentence set aside and substituted with five years' jail and one stroke of whipping.

Reported by Ashok Kumar